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HWANG DBS SECURITIES BHD

v.

YEE WOOI TIONG;
TANG SOON ONG (THIRD PARTY)

B

HIGH COURT MALAYA, PENANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-419-2005]
18 AUGUST 2010

C

CIVIL PROCEDURE: *Action - Limitation period - Whether defendant's claim against third party was subject to limitation period by virtue of O. 16 Rules of the High Court 1980 - Whether third party proceedings can be regarded as independent of and separate from*
D *proceedings by a plaintiff against a defendant*

CIVIL PROCEDURE: *Third party proceedings - Indemnity - Whether third party has to contribute or indemnify defendant for losses incurred in trading - Whether defendant could commence an action against third party - Whether action was time barred*
E

CIVIL PROCEDURE: *Documents - Documentary evidence - Whether defendant can rely on letter and statutory declaration sworn by third party under s. 115 Evidence Act 1950 - Whether the documents were sufficient to estop third party from disputing liability*
F

LIMITATION: *Period of limitation - When time bar begins to run - Indemnity against third party - Whether time began to run from the date of consent judgment - Whether defendant's action against third party within limitation period*

G

SECURITIES: *Remisier - Duties of - Negligence - Whether remisier has a responsibility on trading account under his care - Whether remisier has to pay indemnity to stockbrokers for losses incurred in trading*

The plaintiff was a stock broking company where the defendant
H had opened a trading account. The third party was a remisier at the material point of time operating the defendant's trading account. In 1997, there was a loss of RM299,782.37 resulting from the trading of shares; and the plaintiff demanded the said sum from the defendant. The third party then, *vide* a letter and a
I sworn statutory declaration, admitted that he would take full responsibility for all the losses incurred and further declared that

the defendant was not aware of the shares that he bought without permission which resulted to the loss. In 2000, the plaintiff served the defendant with a notice of demand.

A consent judgment was entered between the plaintiff and the defendant in 2005 whereby without admission of liability, the defendant agreed to pay the plaintiff a sum of RM75,000 inclusive of interest. The defendant then brought an action against the third party to contribute or indemnify him of the said sum. At the outset, both parties agreed to proceed with the trial under O. 14A Rules of the High Court 1980 ('RHC') where the following questions were formulated for the court's determination: (1) whether the defendant's claim against the third party was time-barred and when the time began to run; (2) whether the third party was served with the notice by the defendant within the limitation period of six years; and (3) whether the consent judgment recorded between the plaintiff and the defendant without the approval, consent and knowledge of the third party was binding and enforceable against the third party.

Held (allowing the application in favour of defendant with costs):

(1) In relation to third party proceedings under O. 16 RHC, time would begin to run from the date when the defendant was 'made liable' or 'held liable' to the plaintiff by a court of law. The consent judgment entered between the plaintiff and the defendant did not fall within the ambit of the meaning 'held liable'. The defendant was not 'made liable' or 'held liable' but was obligated to pay the agreed sum stated in the consent judgment. For that reason, the date of the consent of judgment could not be taken into account for the purpose of computing the limitation period. (paras 9 & 10)

(2) Third party proceedings for contribution under O. 16 RHC, should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. Hence, it did not depend on the date when the cause of action arose between the plaintiff and defendant in computing the limitation period. The defendant could have only sought contribution or indemnity from the third party when his liability was made known to him in 2000 upon being served the notice of demand by the plaintiff. This was due to the fact that the remisier *ie*, third party had admitted operating the defendant's trading account without his knowledge or permission which

A resulted in that loss. Therefore, for the purpose of computing the limitation period, time would begin to run from the date where the defendant received the notice, which was still within the time frame of six years and thus, not time-barred. (paras 11 & 12)

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(3) The third party's exoneration of the defendant from all liabilities and admitting full responsibility for all losses in the defendant's trading account with the plaintiff, were explicit and unequivocal. Hence, whether the losses were determined by a C consent judgment or by the court after a full trial or by an agreement or any other mode, it did not vitiate the third party's liability and responsibility towards those losses. The third party's letter and sworn statutory declaration estopped the third party from disputing his liability, which was rightfully D his as he was the one who incurred those losses; see s. 115 Evidence Act 1950. The third party was well aware of the losses from his own trading using the defendant's account and did not dispute the amount claimed. Hence, the third party had to contribute or indemnify the defendant for the sum lost. E (para 17)

Case(s) referred to:

George Wimpey & Co Ltd v. British Overseas Airways Corporation [1954] 3 All ER 661 ***(refd)***

Khairuddin Abd Rahman v. Capital Corp Securities Sdn Bhd [2001] 1 LNS F *148 HC* ***(refd)***

Leader Cable Industry Bhd v. Tiong Nam Trading & Transport (M) Sdn Bhd; Ramachandran Naidu Abai Naidu (Third Parties) & Anor [2000] 1 LNS 156 HC ***(refd)***

Mat Abu Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***

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Post Office v. Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363 ***(refd)***

RHB - Cathay Securities Pte Ltd v. Ibrahim Kahan [1999] 3 SLR 464 ***(refd)***

Therese Chong v. Kin Khoon & Co [1976] 1 LNS 165 FC ***(refd)***

H *Wong Siew Choong Sdn Bhd v. Anvest Corp Sdn Bhd [1999] 3 CLJ 738 FC* ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 10(1)(c)

Evidence Act 1950, s. 115

I Rules of the High Court 1980, O. 14A, O. 16

For the defendant - V Amereson; M/s Amereson & Meera
For the 3rd party - Jeegadeeson Thavasu; M/s Jega Kumar & Partners

Reported by Melanie Murthy

JUDGMENT

Chew Soo Ho JC:

Decision

[1] A consent judgment has been entered into between the plaintiff and the defendant on 13 January 2005 before Her Ladyship Su Geok Yiam, J whereby without admission of liability, defendant agrees to pay the plaintiff the sum of RM75,000 inclusive of interest and that such sum is to be paid by monthly instalments of RM2,000 per month effective from 1 February 2005 until full settlement coupled with a default clause, *inter alia*. The matter before this court now is the action by the defendant against the 3rd party for contribution or indemnity of the aforesaid sum in the said consent judgment.

The facts submitted by the defendant are as follows:

[2] The plaintiff is a stock broking company where the defendant had opened a trading account. The 3rd party was at all material time a remisier who operated the defendant's trading account. During the period between 24 April 1997 to 20 May 1997, there was a loss of RM299,782.37 resulting from the buying and selling of shares. The plaintiff then demanded the said sum from the defendant.

[3] The 3rd party then *vide* a letter dated 31 March 1998 admitted that the defendant should not be held liable for any amount owing under the said account and then by a statutory declaration sworn on 1 June 1998, admitted that he would take full responsibility for all the losses incurred and further declared that the defendant is not aware of the shares that he bought without permission which had resulted in the losses.

[4] The plaintiff instituted legal proceedings against the defendant on 12 September 2000 and defendant obtained the leave to institute 3rd party proceeding and filed the 3rd party notice on 20 December 2004. Upon the aforesaid consent judgment having been entered, the defendant now seeks contribution or indemnity from the 3rd party for the sum of RM75,000.

[5] At the outset of this trial, both parties have agreed to proceed with this trial only on questions of law under O. 14A of the Rules of the High Court 1980 which will determine the entire case between the parties since facts are not disputed. Three questions of law formulated by both parties for the determination of this court are as follows:

(i) Whether the defendant's claim against the 3rd party is time-barred and when does time begin to run *vis-a-vis* the claim by the defendant against the 3rd party?

(ii) Whether the 3rd party notice issued and served by the defendant is done within the limitation period of six years,

(iii) Whether the consent judgment recorded between the plaintiff and the defendant without the approval, consent and knowledge of the 3rd party is binding and enforceable against the 3rd party.

[6] Both parties have submitted respective written submissions and I shall now consider and determine the three questions raised above. Indeed the first two questions can be considered together as they refer to same issue of time limitation.

1st Question: Whether The Defendant's Claim Against The 3rd Party Is Time-Barred And When Does Time Begin To Run *Vis-a-Vis* The Claim By The Defendant Against The 3rd Party?

2nd Question: Whether The 3rd Party Notice Issued And Served By The Defendant Is Done Within The Limitation Period Of Six Years?

[7] Learned counsel for the defendant submitted the Supreme Court case of *Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 which held, *inter alia*, that:

(1) ...

(2) Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has a right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is liable.

(3) Therefore in the case of the third parties here, section 2 of Public Authorities Protection Act 1948 should not assist them although the third-party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 January 1981) or the date of death of the motorcyclist (16 July 1981).

In brief the Supreme Court has made it very clear that time begins to run only from the date a defendant is liable to a plaintiff's claim.

[8] It is further submitted by the defendant that even if one is to take into account the date of default ie, the date when the notice of demand was sent by the plaintiff to the defendant which was 29 February 2000, the 3rd party proceeding is still within the time. Third party notice was issued on 20 December 2004 pursuant to an order of the court dated 11 October 2004.

[9] Learned counsel for the 3rd party submitted that when the Supreme Court in *Mat Abu bin Man*'s case held that "When a defendant is made liable to the plaintiff ...", the defendant must be "made liable" before he could open his case against the third party and time begins to run upon the defendant being made liable but in the present case, defendant was never made liable by a Court of Law. He contended that the consent judgment entered between the plaintiff and the defendant was without admission of liability basis and there is therefore no liability. He suggested that it was only after a full hearing that the court could have come to a decision or conclusion that the defendant be held liable and could further order the 3rd party to contribute or indemnity the defendant to an extent of the liability which the court may apportion or to direct the defendant to prove his case against the 3rd party. Time then begins to run from the date of such pronouncement; without which the defendant will have to fall back to the date when the cause of action arose against the 3rd party. Since the cause of action arose on 20 May 1997 when the defendant failed to pay the contra losses, he submitted that the defendant's action is clearly time-barred for having exceeded six years.

[10] In *Mat Abu bin Man (supra)*, the Supreme Court dealt basically with the provision of s. 10(1)(c) of the Civil Law Act 1956 which gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage. It relates to action based on tort. Nevertheless,

in so far as limitation and as to when time begins to run, this case is indeed on point. What is clear in the decision of the Supreme Court is that in relation to third-party proceedings under O. 16 Rules of the High Court 1980, time does not begin to run from the date of the cause of action but when the defendant is made liable to the plaintiff. I find learned counsel for the 3rd party herein has raised a valid point of argument that the time begins to run from the date the defendant is made liable or held liable. When the Supreme Court used the words 'is made liable' or 'is held liable', it connotes none other than the defendant 'is made liable' or 'is held liable' by the court after a trial or some proceedings which resulted in the court imposing liability on the defendant. From the aforesaid consent judgment entered into between the plaintiff and the defendant without any admission of liability, I must agree with the submission by learned counsel for the 3rd party that the defendant was not 'made liable' or 'held liable' by the court but that he was obligated to pay the agreed sum as stated in the consent judgment. I am inclined to hold the view that consent judgment does not come within the ambit of the meaning of 'held liable' and hence the time does not begin to run from the date of the consent judgment for the purposes of computing the limitation of six years. What then should be the date when the time should begin to run? The 3rd party submitted that it should commence from the date of the cause of action ie, when the failure to settle the contra losses which accrued on 20 May 1997 and the defendant's notice to 3rd party would have been time-barred when it was issued on 20 December 2004 pursuant to a court order dated 11 October 2004 citing in support the House of Lords case of *George Wimpey & Co. Ltd v. British Overseas Airways Corporation* [1955] AC 169, [1954] 3 All ER 661, [1954] 3 WLR 932. Defendant contended otherwise that the time should run from the date the notice of demand for the default payment was issued by the plaintiff to the defendant which is 29 February 2000. Hence when the 3rd party notice was issued, it was still well within time limitation.

[11] In the light of our Supreme Court case in *Mat Abu bin Man (supra)*, the *George Wimpey*'s case as submitted by (earned counsel for the 3rd party should be read subject to *Mat Abu bin Man*'s case in drawing a distinction in our third party proceedings under O. 16 of the Rules of the High Court. The Supreme Court had expressly held that "Order 16 of the Rules of the High Court 1980 deals with third-party proceedings but a proceeding under the order should not be treated in the same way as an action

between a plaintiff and defendant" and "third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant." Third-party proceedings therefore are construed as an independent and separate proceeding. It does not, in that sense, depend on the date when the cause of action arose as between the plaintiff and defendant in computing the limitation period.

[12] Certainly as held by Supreme Court above, if a defendant is made liable or held liable, time begins to run from the date the defendant is held liable. In the situation in the instant case, I favour the argument by the defendant that time should begin to run from the date the plaintiff had sent the defendant a notice of demand for payment dated 29 February 2000. I say so because in the first place the defendant did not transact to incur the substantial losses in his trading account; it was the remisier Tang Soon Ong, the 3rd party who had admitted to have used the defendant's account to trade in securities without the knowledge and permission of the defendant. It is thus reasonable to infer that defendant was unaware of the accrual of the action and default payment in his trading account until he had been sent a notice of demand dated 29 February 2000. In addition, for the intent and purposes of a third party proceeding, defendant could only seek contribution or indemnity when he was given notice of demand and intended legal action. Defendant could not be expected to seek contribution or indemnity from the 3rd party when he was not aware of the debt in his trading account misused by the 3rd party nor could he do so if the plaintiff did not claim from him. He would only acquire his right against the 3rd party when his liability was made known to him. Therefore, I hold that for purpose of computing the limitation period, time should begin to run in such circumstances from the date of the receipt of the notice of demand by the defendant from the plaintiff which is on or about 29 February 2000. Defendant's third-party proceeding under O. 16 Rules of the High Court 1980 against the 3rd party is consequently not time-barred.

3rd Question: Whether The Consent Judgment Recorded Between The Plaintiff And The Defendant Without The Approval, Consent And Knowledge Of The 3rd Party Is Binding And Enforceable Against The 3rd Party

[13] The only point contended by the 3rd party is that the consent judgment entered into between the plaintiff and the defendant was done without the approval, consent or knowledge

of the 3rd party. It was submitted that since the 3rd party had entered his conditional appearance two days before the consent judgment was entered, the defendant should not have done so without the 3rd party's consent, approval and/or knowledge. He cited the case of *Leader Cable Industry Bhd. v. Tiong Nam Trading & Transport (M) Sdn. Bhd.; Ramachandran Naidu Abai Naidu (Third Parties) & Anor* [2000] 1 LNS 156; [2000] 5 MLJ 661 at Held (2) as follows:

> (2) The insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement (see p 664C-D); *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 followed. In this regard, the words 'by agreement' refers to a settlement reached between the insured and the injured person but with the consent of the insurer. Commercial Union never agreed to the consent judgment entered into by the defendant and the plaintiff. Therefore, Commercial Union cannot be said to be liable to indemnify the defendant (see p. 664E-F).

Relying on the aforesaid authority, learned counsel for 3rd party submitted that the 3rd party is not bound by the consent judgment and he is not liable to contribute or indemnify the defendant.

[14] Defendant submitted that he cannot declare void the existence of the contract between him and the plaintiff. Based on the 3rd party's letter and statutory declaration, it was submitted that the 3rd party had made a clear admission and there is nothing to stop the defendant from entering into such settlement without admission of liability to seek contribution or indemnity from the 3rd party. He cited the case of *Khairuddin Abd. Rahman v. Capital Corp. Securities Sdn. Bhd.* [2001] 1 LNS 148 which deliberated *inter alia*, on the KLSE's rules and by-laws and their breaches which only attract penalties by the authorities on the member companies but do not render void or illegal a contract between a member and a remisier or between a remisier and buyers of shares for failure to comply with the rules or by-laws referring to *Therese Chong v. Kin Khoon & Co.* [1976] 1 LNS 165 FC, *RHB - Cathay Securities Pte Ltd v. Ibrahim Kahan* [1999] 3 SLR 464 and *Wong Siew Choong Sdn. Bhd. v. Anvest Corp. Sdn. Bhd.* [1999] 3 CLJ 738.

[15] In normal circumstances, it would not be advisable for a defendant to enter into a consent judgment with the plaintiff without the consent or knowledge of a third-party when the defendant intends to seek a contribution or indemnity from the third-party. By doing so, it not only deprives the third-party of his right of being heard but also imposes arbitrarily on him the liability of a sum which he might not have agreed. The defendant may fail in his bid for contribution or indemnity. Third party herein submitted that an agreement or settlement between the insured and the injured person but without the consent of the insurer will not make the insurer liable to indemnify the insured/defendant which is as decided in *Leader Cable Industry Bhd*'s case *(supra)*. I am of the view that *Leader Cable Industry Bhd*'s case is distinguishable from the instant case in that under the *Leader Cable*'s case, terms and conditions of the marine insurance policy of the insured/defendant, it was expressed that the insured for any sum or sums paid by the insured to owner of the goods carried by reason of the assured becoming legally liable for any claims or damages to the goods carried. Similarly in *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 which was followed in *Leader Cable Industry*'s case, there was similar term and condition in the insurance policy which the insurance company would indemnify the insured against all sums which the insured shall become legally liable to pay as compensation. Therefore the court decided that liability must be ascertained and any agreement must be with the consent of the insurer.

[16] The present case before this court does not involve any terms and conditions in any insurance policy but a letter of the 3rd party dated 31 March 1998 duly signed by him together with the defendant in the presence of a Commissioner for Oath (see Ikatan Dokumen defendan terhadap pihak ketiga p. 24) and a Statutory Declaration sworn by the 3rd party on 1 June 1998 before a Commission for Oath (Ikatan Dokumen defendan terhadap pihak ketiga p. 25). In both these documents, the 3rd party unequivocally exonerates the defendant from all liabilities for any amount owing under defendant's said trading account with the plaintiff. In his Statutory Declaration, the 3rd party further confirms that he is personally responsible for all losses incurred in the defendant's said trading account and takes full responsibility to bear all losses to the plaintiff. He also declares that the defendant is not aware of the shares that he bought without defendant's permission resulting in the losses.

[17] The fact that 3rd party exonerates the defendant from all liabilities and admits full responsibility of all losses in the defendant's said trading account with the plaintiff, is explicit and unequivocal. Hence, whether the losses were determined by a consent judgment or by the court after a full trial or by an agreement or any other mode, it does not vitiate the 3rd party's liability and responsibility towards these losses. Indeed from the two documents above, the 3rd party is estopped from disputing his liability which is rightly his as he is the one who incurred those losses; see s. 115 Evidence Act 1950. Third party is well aware of the amount of losses from his own trading using the defendant's said account. He did not challenge the amount in the consent judgment to be excessive of what was due to the plaintiff. Third party therefore, cannot now allege that he is not liable to indemnify the defendant for any sum of losses due to the plaintiff from that trading account.

For the foregoing reasons, I answer this 3rd Question in the affirmative on the facts and circumstances of this case.

Conclusion

[18] Having determined all the three questions above, I order that judgment is entered for the defendant against the 3rd party in the sum of RM75,000 being the 3rd party's contribution or indemnity to the defendant which sum had been fully paid by the defendant to the plaintiff under the said consent judgment dated 13 January 2005 with interest at 8% from the date of judgment to the date of satisfaction and costs of RM7,000.